

## SCRA response to the Scottish Government's consultation

### Background

The Children's Hearings System is Scotland's distinct system of child protection and youth justice. Among its fundamental principles are:

- That children who offend and children who are in need of care and protection are dealt with in the same system
- That the welfare of the child remains at the centre of all decision making

### Summary response

SCRA welcomes the opportunity to comment on the draft Procedural Rules, which are a crucial adjunct to the primary legislation and which will determine in large part whether the reformed Hearings System functions effectively. As an Appendix to this response, which covers the key issues about which we are concerned, we have produced a Rule-by Rule set of comments which we hope will assist the Scottish Government in the redrafting process. This response therefore focuses on a number of key issues. We have also appended a series of case examples which illustrate some of the points that we are making.

We understand that in drafting the Rules, the Scottish Government has the following key policy objectives:

- To meet the requirements of the 2011 Act
- To give clear instructions to professionals and lay persons involved in the hearings system
- To protect the rights of all those involved in a pre-hearing panel or children's hearing
- To deliver a child / family friendly system

We are fully supportive of each of these but do not believe that the Rules as currently drafted meet those objectives. In particular, the sheer volume, excessive complexity and specificity of the rules makes them extremely hard to understand and interpret, even for highly experienced Reporters. In their current form they are simply not usable and are liable to create confusion and delay. We would greatly prefer a lesser number of more general rules and believe that this is achievable. The Rule-by-Rule response at Appendix B includes reference to where we believe some rules could be combined and simplified.

A number of the Rules seem to be driven by what is in our view a disproportionate response to perceived ECHR issues. The "solutions" to those perceived problems do not seem to take account of the impact on the wider system and as a result, they risk creating an unnecessarily bureaucratic and process-driven Hearings System that loses focus on its key goal of making decisions in the best interests of children and further distances them from their proper place at the centre of proceedings. Some Rules may actually create ECHR vulnerabilities by creating unnecessary interference with the child's and relevant persons' right to respect for private and family life.

### Detailed response

We have particularly serious concerns around the following areas:

## **Notification and “Established family life”**

This term appears in two areas of the legislation

1. in relation to who must be notified of a hearing
2. in relation to contact review hearings

Rule 21(2)(d) provides that the Reporter is required to notify all those who appear to have “established family life” with the child of the date, time and location of the Hearing. This is in addition to the requirement to notify:

- Existing relevant persons (RPs) (which will now include all parents)
- Persons who have, or have recently had, significant involvement in the upbringing of the child
- Persons who have a contact order
- Persons whose contact is regulated by a permanence order

“Established family life” therefore covers potentially large numbers of people who have no legitimate interest in being notified of the Hearing (please see the case examples at Appendix A for more detail). This is a potentially significant, and disproportionate, interference with the child’s and relevant persons right to respect for their private and family life as well as creating a number of practical challenges.

- Large numbers of people being notified who have no prospect of being deemed a RP, but also in a significant number of applications for RP status which have to be dealt with by panel members.
- Seeming potential for having to notify people at every stage of the process, even where they’ve had ample opportunity to apply for RP status (and even if they’ve already been refused that status)
- Additional burdens on the courts, as well as resulting in further lengthy formal legal processes that create additional stress and uncertainty for the child.
- Problems in relation to other stages of the process, for example where grounds have been accepted without the involvement of someone who is subsequently deemed to be a relevant person

It is our view that the significant involvement test is the appropriate one for the Reporter to apply when deciding who to notify of the Hearing (those whose interest is in relation to contact will be brought in at the contact review hearing stage and should not be notified unless they also meet the significant involvement test.) This would ensure that only those who might be deemed relevant persons by a Hearing would be notified and would avoid creating unnecessary interference with the child’s and relevant persons’ right to respect for their private and family life..

## **Why is the term “established family life” included?**

The inclusion of an established family life test appears to be a response to the K case, in which the Supreme Court decided that in order to avoid ECHR incompatibility, section 93(2)(b)(c) of the 1995 Act should be read as: ‘ ....any person who appears to be a person who ordinarily (and other than by reason of his employment) has charge of, or control over, the child or who appears to have established family life with the child with which the decision of a children’s hearing may interfere’.

The Supreme Court framed the reading down of section 93(2)(b) to include persons other than parents who have established family life with a child, but in its Judgment took a more restricted approach to non-parents than to parents.

It was not the intention of the Supreme Court to open up the definition of relevant person to include all extended family members who have a ‘typical’ extended family relationship or bond with the child and who have regular informal contact with the child. At paragraph 68 the Supreme Court noted: “If all that may be at risk is informal contact with the wider family, then the participation of each parent and the child will in most cases afford adequate procedural protection for any Article 8 rights which the child and other family members may have. But there are cases in which the child’s hope of reintegration in her natural family depends upon maintaining the close relationship established with a grandparent or other family member. There would then be a procedural obligation to involve that relative in the decision-making process.”



We consider therefore that the Rules as drafted take an overly broad and incorrect interpretation of the decision in K and result in a disproportionate impact on the Hearings System and in particular on the child's rights and experience of the process.

### **Contact reviews**

S.126 of the 2011 Act provides that where a Hearing makes or varies a CSO, an ICSO or an MEO which contains a direction regulating contact, the Reporter must arrange a further Hearing within 5 days to review that condition if:

- There exists a contact order or permanence order regulating contact between the child and an individual (other than a RP)
- Requested to do so by an individual who has established family life with the child (as specified in the draft Review of Contact Directions and Definition of Relevant Person Regulations)

Rule 75 defines the process that these Hearings are subject to. We will comment in detail on the link between Contact Reviews and "established family life" in our response to the Review of Contact Directions and Definition of Relevant Person Regulations. However, we note that we do not consider this to be an appropriate test to allow someone to call a Contact Review hearing.

We note that the timescales for such reviews are likely to be unworkable in many situations and may present significant challenges in scheduling a hearing, as well as ensuring that the child and RPs are able to attend and participate effectively.

There is no apparent power to defer the Contact Review Hearing in the event, for instance of the child not attending. This is of particular significance given the extremely tight timescales which make it very likely that at least one of the child or relevant persons will be unable to attend.

We consider that the provisions relating to what documents should be provided to participants (especially those who are not relevant persons) are too broad. Rule 43 refers to "any relevant document". It may be that only a single paragraph of such a document is relevant to the discussion on contact but the whole report would have to be provided. Again, this seems to be an unwarranted interference with the privacy rights of the child and relevant persons.

### **Non-disclosure**

Rule 84 provides that the Reporter must refer the matter of whether any information or document relating to a Children's Hearing should be withheld from a specified person if requested to do so by the child, RP or Safeguarder. The Reporter may also refer if requested to do so by the author of a report or other document (or on the Reporter's own initiative).

This provision appears to be a confused (and confusing) melange of a number of different existing provisions, along with the provision in s.178 of the 2011 Act which allows the child to speak to the Hearing in private and for the information provided to be withheld in certain circumstances. We consider that the provisions for the Hearing to speak to the child in private should be separated out from issues of non-disclosure as they are very different. Further, none of the rules reflects the power of the Hearing to include in Orders a measure prohibiting disclosure of certain information.

Currently the Reporter can use Rule 9 to withhold address/location information from the papers sent out in advance of the Hearing (please see the case examples for more detail). We note that this provision was introduced following the killing of a woman by her ex-partner who had been given her address. Under the new rules, this would have to be referred to a Hearing (or a Pre-Hearing Panel) for consideration (potentially involving the hearing of representations from all the parties). This in our view is a totally disproportionate provision which will greatly increase the time spent by Hearings on procedural matters. Rule 9 only allows the Reporter to withhold information where it is considered that providing it would disclose the whereabouts of the child or any relevant person and may place that person at risk of serious harm. We do not consider that continuation of this power would create any ECHR vulnerabilities as it is merely an appropriate exercise of the discretion required by any agency dealing with such sensitive



situations. Furthermore, for some reason, the provision in the draft Rules excludes the statement of grounds. However, Grounds for Referral for example currently contain the child's address and in our view there needs to continue to be a means of withholding that address where to disclose it would place the child or a relevant person at risk. We would suggest strongly therefore that an equivalent of Rule 9, applying to all information which the reporter has a duty to provide, is included in the new Rules so that the Reporter can continue to protect the child/RP where necessary.

The list of criteria contained in Rule 90 are very detailed and yet do not make any mention of the risk of serious harm to the child (or any other person) which should be the overriding consideration and needs to be made more explicit.

We believe there is a need for the Rules to continue to provide an ability to exercise a degree of discretion over information provided to children. For example, under current practice a report writer may omit information from the child's version of the report in line with agreed criteria, essentially based on significant distress or harm to the child or other person. Exceptionally the Reporter may redact information from a report. (Please see the case examples for more detail). The Rules require the very cumbersome and confused process at the Hearing or Pre-Hearing Panel to be applied. There is no provision for the child to be treated differently in the draft Rules.

### **Information sharing**

We have raised this issue a number of times with the Scottish Government. There is a clear expectation that SCRA will need to share information with Children's Hearings Scotland in order for the Hearings System to function effectively under the 2011 Act. For example, there will be circumstances where CHS would require case information from SCRA in order to investigate a complaint about a panel member. There is currently no statutory provision to enable this to take place. We have discussed this issue with the Information Commissioner's Office and are aware that they share our concerns.

### **Legal aid**

While we acknowledge that there will be a separate consultation on the legal aid regulations, we understand that the Hearing will continue to have a role in the process and we would therefore expect to see more content in the procedural rules. Mention of the Hearing considering legal representation only appears in relation to secure authorisations and non-disclosure in the current draft.

### **Deemed Relevant Person**

We consider that there requires to be provision for a Pre-Hearing Panel or Children's Hearing to consider whether someone should continue to be deemed to be a relevant person in advance of the review of a compulsory supervision order.

### **Grounds Hearings**

We have previously raised with the Scottish Government the issue of sections 90 and 91 of the 2011 Act, whereby there is no provision for the chairing member to ask whether the facts contained within the statement of grounds are accepted and no power for the Hearing to direct an application to the Sheriff if the ground is accepted, irrespective of whether all the facts are accepted. This will have significant implications for decision-making by Hearings. If the Act itself is not to be amended then it requires to be addressed as far as possible within the Rules. The rules as currently drafted do not provide a solution.

### **Conclusion**

We continue to be fully supportive of the reform agenda and of the Government's policy objectives. However, we feel that there is a need for the Rules to be significantly redrafted before they meet those objectives and the needs of stakeholders in the system. We stand ready to assist in that process however we can.

**SCRA**  
**January 2012**

